Louisiana Law Review

Volume 22 | Number 4
Symposium: Louisiana and the Civil Law
June 1962

Competition in the Regulated Industries: Transportation, by Carl H. Fulda. Little, Brown and Company, Boston, 1961. Pp. xxviii, 533. $20.00.

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to cope with anticipated breach in advanced planning for what would otherwise have been a crisis in 1715. Finally, in 1873 the Bourbons of France ("Henry V") managed to be as intransigent as their seventeenth century counterparts in Britain and thus lost out completely.

Another contrast between English and French usage may be pointed up in the attitude toward the coronation. Apart from the sanctity of the coronation oath, I cannot see that the English in their essentially secular attitude have ever attached any primary importance to regal consecration, though there is one medieval instance of a son's coronation in his father's lifetime.[23] To an Englishman an oath or an instrument under seal is very much more important than canonical incantation. In the seventeenth and eighteenth centuries the doctrine of divine right was certainly vital to many, but the ultimate issue for them was *sangre* not *sacre.*

The number of pages of this work belies the extent of the study which is published in quarto size in closely printed eleven point type in two columns. Anyone interested in constitutional history should find the study quite absorbing.

Joseph W. McKnight†

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This is the fourth volume in a Trade Regulation Series, presenting the subject "with the greatest possible clarification, as a guide for the general practitioner who has little experience in this field, for the economist or business executive who wants to be quickly orientated . . . and for the specialist who desires a ready reference tool." This volume, dealing as it does with the tangled skein of present-day transport regulation is hardly a beginner's volume; it will be invaluable to the economist and business executive, however, and to the specialist searching for

23. To insure the succession for his son Henry, Henry II had his son crowned King of England in 1170, an event that is of little importance except with respect to the part it played in the struggle between Henry II and Becket. Henry predeceased his father, who was succeeded in the normal course of things by Richard I.

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fruitful discourse on accommodating the regulatory patterns with the anti-trust laws. This is an effort, and a very good one, to outline a philosophy of functions for competition and regulation in transportation; recognition of the need for such a synthesis and the "irresistible challenge" to make it were a natural product of using Schwartz's teaching materials in free enterprise law.

The voluminous and often chaotic transportation materials are skillfully organized under six major headings: Part I deals with the relationship between competition and regulation; Part II, with the various modes of transportation, with generous chapters on the burgeoning problems of motor carriers and commercial aviation; Parts III and IV have to do with rate agreements in surface transportation, the problems of inter-mode competitive rate-making, and the continuing attempts to integrate competing modes of transportation; Part V develops the effects of the doctrine of primary jurisdiction as a limiting force on judicial participation in the regulatory process; and, finally, Part VI presents a summation and critique of the present state of competition and regulation. The materials drawn upon are not only administrative and judicial opinions but also a complex array of legislative and private studies which have been accumulating since the hectic decade which culminated in the policies announced in the Transportation Act of 1940.

The central theme of the book is stated to be accommodation of the philosophy of competition with the philosophy of the regulatory statutes. More accurately, perhaps, it is to define the role of competition in the regulated fields here treated, particularly as to certification of new service, mergers, and rate and other agreements. The problem of accommodation was brought into sharp focus in the *McLean* case[1] of eighteen years ago: Was the ban of the anti-trust laws to be deemed lifted only if the National Transportation Act policies would be thwarted, or was the ban to be lifted for an alleged improvement in transportation, quickly achieved by anti-competitive means but also achievable by more time-consuming means which would preserve competition?

Chapter 2 gives a summary view of the regulatory acts and sketches the crucial economic differences between railroads and other transportation; the railroads' position is described as com-

1. McLean Trucking Co. v. United States 321 U.S. 67 (1944).

parable to the traditional "natural" monopolies such as electricity, gas, and telephones because of the large investment in physical plant or fixed capital required to render service and the accompanying phenomena of decreasing unit costs with increasing sales. While it seems to this reviewer "natural monopoly" terminology lost much of its accuracy when expanded to cover other than genuinely unique sources of public service, the cost properties alluded to are undoubtedly common to the utilities mentioned. In any event there is little question but what the differences in costs which exist between railroads on the one hand, and motor and water carriers on the other, is the most complex factor in inter-mode rate making. The Transportation Act of 1940 sought to "preserve the inherent advantages of each" mode and at the same time to eliminate "unfair or destructive competitive practices." Perhaps the knottiest competitive problem, and one to which the author devotes a good part of his most difficult chapter, is that of determining whether "decreasing unit cost" phenomena is "an inherent advantage" or a "destructive competitive practice" when used by railroads in price competition with motor or water carriers.

In Chapter 13 the author develops the chaotic case law of the Interstate Commerce Commission on this subject concluding that "regrettably, one searches in vain for an unambiguous pronouncement of general policy" as to what makes a rate compensatory and hence constructively competitive rather than noncompensatory and hence constructively predatory and destructive of competition. The confusion and difficulty to be found in the cases are said to stem from the Commission's practice of using conflicting theories, depending on which provides the best solution for the case at hand. Perhaps one of the potential contributions of this book has here been insufficiently realized; a fuller development of the economics of decreasing unit costs would have been helpful to many readers in appreciating railroad behavior. Likewise, more detailed analysis of the "value of service" principle often urged by water and motor carriers would have been helpful, since it is not as clear to the reader as to the author that "differential" or "value of service" pricing is incompatible with "decreasing unit cost" pricing. Bonbright[2] notes, for example, that "in the literature of economics, the value-of-the-service principle is taken most frequently to mean that principle of rate design under which the differences in the price

2. BONBRIGHT, PRINCIPLES OF PUBLIC RATES 89 (1961).

charged by a given enterprise for its various products are based, not just on differences in the costs of production but also in part on differences in the relative price elasticities of demand. Products for which the demand will not be seriously curtailed by relatively high prices will be made to bear these prices. Products for which the demand will vanish or fade if the prices are set far above out-of-pocket or marginal costs will be priced nearer to these costs." To Bonbright, differential rates would not necessarily have to "return more than fully distributed costs."

In any event, the central debate between rail and motor carriers is made clear; the railroads would like to be free to cut rates to "out-of-pocket" or marginal costs plus something to apply on constant costs, where necessary to retain tonnage; the motor carriers, with much higher "out-of-pocket" costs, would limit competitive rate-cutting to a floor of "fully distributed" or average costs. The author notes that fatal consequences to a motor carrier's participation in traffic would quickly follow a rate war which carried rates below motor carrier out-of-pocket costs while allowing a railroad to recover such costs plus something to apply on constant or fixed costs. He suggests that "approval of a rate reduction by one mode with fatal consequences to the competing mode would be consistent with the National Transportation Policy (preserve the inherent advantages of each) only if the latter mode offers no advantages of its own to the users of transportation, or if the cost differential in favor of the mode proposing the reduction is so great as to cancel out whatever advantages the opposing mode may possess." He also suggests that clarity in identifying cost differentials might be achieved by "recognizing fully distributed costs as the basic standard for cost," perhaps combining with it "the added-traffic and value of service theories."

But, in suggesting fully distributed costs as the basis of comparison between all modes of transport, some might ask whether this does not effectively preclude use of the lower "out-of-pocket" or marginal costs of railroads as an "inherent advantage" of the mode. If a railroad, operating at less than capacity and hence not utilizing fully its constant costs, can make some contribution towards them at a rate covering less than its fully distributed costs, should this be deemed the predatory rate cutting — which the Commission must prevent — or merely the realization of an "inherent advantage" enabling it to meet, but

not put an end to competition? It would seem that a rate cut based on an "added traffic" theory would be plausible mainly in a context of such marginal pricing, *i.e.*, the recovery of "out-of-pocket" costs plus some contribution toward constant or overhead costs.

This is but one of the many teasing problems competently treated in the treatise; throughout, the author's many penetrating insights are put forth modestly and, to quote, as no more than "an experimental synthesis." It seems likely that this work received a thorough thumbing in the preparation of the President's recent message to the Congress on "An Efficient Transportation System."

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Moore's Federal Practice (Second Edition). Volumes 1 and 1A. (Co-authors, Volume 1: James Wm. Moore, Lindsey Cowen, Felice R. Cutler, Howard P. Fink, Warren J. Kaps, Allan D. Vestal) (Co-authors, Volume 1A: James Wm. Moore, Alan Y. Cole, Howard P. Fink, William Van Dercreek, Allan D. Vestal). Matthew Bender & Co., 1961.

On September 16, 1938, the Federal Rules of Civil Procedure went into effect. That same year, the first edition of *Moore's Federal Practice* was published, and it is not an exaggeration to state that this monumental work had a profound influence on the development of the law, for it afforded the bench and bar an authoritative guide for the interpretation and implementation of the Federal Rules — to the end that they would achieve their goal, "the just, speedy, and inexpensive determination of every action."

The author of the treatise, Professor James Wm. Moore of the Yale Law School, served as Chief Research Assistant on the Reporter's Staff of the Supreme Court's Advisory Committee in its preparation of the Federal Rules, and the treatise reflects not only his mastery of jurisdiction and procedure, but also his intimate knowledge of the formulation and intendment of the Rules.

Ten years later, the author, taking cognizance of the myriad

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